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CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1932.

No. 423.

LEVERING & GARRIGUES COMPANY, *et als.*,
Petitioners,

vs.

PAUL J. MORRIN, individually and as President of International Association of Bridge, Structural and Ornamental Iron Workers, *et als.*,
Respondents.

BRIEF FOR PETITIONERS.

MERRITT LANE,
Of Counsel, Petitioners.

Pandick Press, Inc., 22 Thames St., New York, U. S. A.

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BRIEF FOR PETITIONERS.

(Italics, etc., mine, except where otherwise noted.)

I.

The Opinions Below.

This case is here on certiorari granted November 7, 1932 (U. S. Supreme Court Advance Opinions, No. 2, p. 117, 77 L. Ed. 117, 53 Sup. Ct. 118), to review a decree of the Circuit Court of Appeals for the 2nd Circuit filed August 30, 1932, page 110, reversing a decree of the United States District Court for the Southern District of New York made February 14, 1930, page 96, affirming a report of a Master

dated October 30, 1929, page 57, which decree of the Circuit Court of Appeals remanded the case to the District Court "with directions to dismiss the bill of complaint without prejudice, for lack of jurisdiction, unless the plaintiffs shall amend to correct the jurisdictional defect."

The report and opinion of the Master is printed page 57 and not otherwise reported; there was no opinion of the District Court. The opinion of the Circuit Court of Appeals rendered August 30, 1932, is printed page 99 of the record and is reported in 61 Federal (2nd) 115.

This Court allowed certiorari "limited to the question of Federal jurisdiction other than questions relating to diversity of citizenship."

II.

Jurisdiction.

The jurisdiction of this Court is rested on section 240 of the Judicial Code as amended by the act of February 13, 1925, chapter 229, section 1, 43 Statutes 938; section 347 U. S. C. A., page 359, Title 28, subdivision "A" of said section.

III.

The grounds upon which the jurisdiction of this court is invoked.

The grounds upon which the jurisdiction of this Court is invoked as stated in subdivision B of paragraph 9 of the petition for the writ, which writ as allowed was limited to a discussion of the matters therein contained, is

The Circuit Court of Appeals in its determination that, notwithstanding that the jurisdiction of the Federal court was invoked upon the ground that there was a substantial question involved arising under the laws of the United States, the District Court having decided adversely to the plaintiffs as to the Federal question, could not proceed to determine the merits of the case arising under the general and local and state laws, cut down the effect of this Court's determination in *Siler* v. *Louisville & N. R. Co.*, 213 U. S. 175, at page 191, 53 L. Ed., at page 757, in a manner probably in conflict with the applicable decisions of this Court, and in direct conflict with the decision of the Circuit Court of Appeals for the Sixth Circuit in *Vogue Co.* v. *Vogue Hat Co.*, 12 Fed. (2nd) 991, in which latter case the Circuit Court of Appeals for the Sixth Circuit said that its views were in conflict with the decision of the Second Circuit Court of Appeals in *Bernstein* v. *Danwitz*, 190 Fed. 604, 605. *General Investment Co.* v. *Lakeshore and M. S. Railway Co.*, 269 Fed. 235, another decision of the Sixth Circuit Court of Appeals, in which, at page 241, the Court expressed the same views as in the later case of *Vogue Co.* v. *Vogue Hat Co.*, 12 Fed. (2d) 991, came to this Court in 260 U. S. 261, 67 L. Ed. 244, and this Court affirmed, with modification, not important here, and there was no criticism in the opinion of this Court of the language of the Circuit Court of Appeals for the Sixth Circuit as to the effect of this Court's decision in *Siler* v. *Louisville & N. R. Co.*, 213 U. S. 175, 53 L. Ed. 753. The Second Circuit Court of Appeals (conceded by itself) is in irreconcilable conflict with the Sixth Circuit Court of Appeals as to the effect of this Court's decision in the case last cited.

IV.

Statement of the Case.

At the time the petitioners filed their bill of complaint herein they were all engaged in fabricating steel without the State of New York for the construction of buildings from material brought in from states other than those in which the plants were located, and in erecting such fabricated steel in New York City. The contracts under which the steel was fabricated and furnished erected in such buildings were made with general contractors in New York, each said contract, as a single transaction, providing for both the fabrication of the steel in states other than New York specially designed for specific buildings, and the erection of said steel by petitioners in New York, the fabricated article being transported from the place where fabricated to New York by petitioners in interstate commerce, that is to say, one contract required both the fabrication and the erection of the steel as part of one operation. The petitioners also did some fabricating of steel without the State of New York from material brought in from such other states and sold the fabricated steel F. O. B. New York City, for erection therein (fabricated specifically for specific buildings). By their bill of complaint filed on March 11, 1925, they sought to enjoin respondents, certain individuals, and Paul J. Morrin, individually and as president of International Association of Bridge, Structural and Ornamental Iron Workers and several locals of the International located in New York, from continuing a secondary boycott against plaintiffs, for the purpose of forcing plaintiffs, who had operated open shop since 1906, to abandon

that policy and enter into closed union shop agreements with the International and its locals, the effect of which would be that, for practical purposes, the entire building industry in the Metropolitan district would be completely unionized and no non-union workman could secure employment, the industry then being completely unionized with the exception of the erection of structural iron and steel. The charge was one of conspiracy to attain an illegal object and likewise that illegal means were employed, threats, intimidation and the like, to accomplish the success of the boycott (p. 1). The jurisdiction of the Court was rested upon: (1) diversity of citizenship; (2) unlawful interference with interstate commerce; (3) violation of constitutional rights of plaintiffs (Par. 20 of bill, p. 16). Upon the filing of the bill temporary restraint went which, after argument, was continued pending final hearing.

The allegations of the bill with respect to the claimed interference with interstate commerce are found in paragraph 18, page 14, and read as follows:

> "Plaintiffs and each of them are all engaged in interstate commerce and plaintiffs charge that the defendants and each of them have formed and are engaged in a conspiracy in restraint of trade and commerce among the several states; that plaintiff's steel used in the erection of buildings in the Metropolitan District in the City of New York and in that portion of the Metropolitan District within the State of New Jersey and in other states of the Union are transported between the several states; that all of the steel used in the City of New York by plaintiffs is transported by plaintiffs from other states; that a portion of the steel used by plaintiffs in the construction in the City of New York and in that portion of the Metropolitan District in the State of New

Jersey is bought by plaintiffs in other states and transported by plaintiffs to New York, other portions of said steel are fabricated by plaintiffs without the State of New York and brought into the State of New York for erection and other portions of said steel are purchased by said plaintiffs for delivery in the City of New York from manufacturers without the State of New York and by said manufacturers transported to the City of New York; that the purpose and intent of said defendants is to prevent the use of said steel in the Metropolitan District somewhere and wherever erected by plaintiffs; that the purpose of said defendants is also to monopolize all labor within the Metropolitan District and within the States of New York and Pennsylvania and New Jersey and throughout the country; that the effect of the success of said defendants will be to destroy the interstate traffic of plaintiffs in steel and will also be to prevent any person not a member of a union from obtaining employment in the building industry; that the purpose of defendants is to compel plaintiffs and all other employers engaged in the construction of structural iron and steel in the territory aforesaid to sign agreements with defendants whereby they will agree not to employ laborers except members of said defendants' unions; plaintiffs charge that the said defendants are therefore engaged in a conspiracy in restraint of trade or commerce among the several states and that the said conspiracy is illegal and the jurisdiction of this court is involved upon that ground."

The jurisdiction of the District Court was specially invoked upon the ground that a Federal question was involved (Par. 21 of bill, p. 17).

Defendants, respondents here, filed an answer and by paragraph 19, on information and belief, denied the allega-

tions of paragraph 18 of the bill and charged that the acts of the defendants mentioned in the complaint were wholly intrastate transactions and had no relation whatever to interstate commerce. Respondents likewise filed a counterclaim against plaintiffs (p. 42) appealing to the jurisdiction of the Court for relief upon various grounds, some based upon the Federal anti-trust acts and others upon the common law.

By consent, an order of reference was made to a Master (p. 57), who took voluminous testimony (p. 58). He filed a voluminous report (pp. 57 to 96), finding that plaintiffs were not entitled to relief under the anti-trust acts, but that they had proven their charges of the employment of illegal methods and recommending a decree for an injunction. To this report respondents filed twenty-nine exceptions (p. 111), no one of which questions the jurisdiction of the Court. On February 14, 1930, a final decree was entered (p. 96) in pursuance of the Master's report. Respondents appealed to the Circuit Court of Appeals for the Second Circuit, and filed 18 assignments of errors (p. 111), no one of which questions the jurisdiction of the Court.

The appeal was heard by the Circuit Court of Appeals upon the merits and neither in the briefs of counsel nor in the argument was any question raised as to the jurisdiction of the Court. The Court directed a reargument upon the question as to whether the allegations of the bill, admitted by the answer, were sufficient to indicate diversity of citizenship. The case was reargued and plaintiffs contended: (1) that the allegations of the bill as to diversity of citizenship were sufficient; (2) that, irrespective of diversity of citizenship, the Court had jurisdiction because of the charge

in the bill that respondents were engaged in a conspiracy in restraint of trade and commerce among the several states (p. 14), and that, although the Federal question was decided adversely to plaintiffs, the District Court did not lose jurisdiction and might proceed to final decree upon the other issues made by the pleadings. The Circuit Court of Appeals handed down a decision on August 23, 1932 (p. 99), 61 Fed. (2nd) 115, holding that the allegations of the bill as to the residence of the Unions were not sufficient and that the case was not one in which the rule of *Siler* v. *Louisville & N. R. Co.*, 213 U. S. 175, at page 191, 53 L. Ed. 753, at page 757, should be applied, and remanded the case to the District Court with leave to that Court to allow plaintiffs to amend by dismissing as against the Locals or by inserting appropriate allegations to show that no one of their members was a citizen of New Jersey or Pennsylvania when the bill was filed and if that were not done, then to dismiss the complaint without prejudice for lack of jurisdiction.

The Circuit Court of Appeals further held that the conduct of respondents did not constitute a conspiracy to illegally restrain interstate trade within the meaning of the Anti-Trust Acts and the decisions of this Court in *Bedford Cut Stone Co.* v. *Journeymen's S. C. Ass'n*, 274 U. S. 37, 71 L. Ed. 916; *Duplex Printing Co.* v. *Deering*, 254 U. S. 443, 65 L. Ed. 349, 16 A. L. R. 196; *Loewe* v. *Lawlor*, 208 U. S. 274, 52 L. Ed. 488; *United States* v. *Brims*, 272 U. S. 549, 71 L. Ed. 403, holding rather that the case was governed by *Industrial Assn. of San Francisco* v. *United States*, 268 U. S. 64, 69 L. Ed. 849; *United Leather Workers Int. Union* v. *Herkert & Meisel Trunk Co.*, 265 U. S. 457, 68 L. Ed. 1104. The Circuit Court of Appeals did not hold that the claims

of petitioners under the Anti-Trust Acts were frivolous, although intimating that it was inclined to believe that the question could not properly be thought doubtful even when the bill was filed March 11, 1925, but expressly stating that it did not decide the point nor rest its decision upon it (p. 108).

In the District Court that part of the original brief of petitioners submitted to the Master which dealt with the question of interference with interstate commerce consisted of some 11 pages; respondents' original brief, 12 pages; of petitioners' brief in reply, 12 pages, and of respondents' brief in reply, 10 pages, and of plaintiffs' brief in reply, 21 pages, and the Master considered the Federal question upon the merits (p. 93). The Federal question was never abandoned by plaintiffs and was urged upon the argument of the appeal upon the merits—that is to say, plaintiffs argued that, even if the Master were wrong in finding that respondents were guilty of illegal acts violating plaintiff's common law rights, still the decree was right because the Master should have held that the conduct of respondents was in violation of the Anti-Trust Acts. It was contended by plaintiffs that even if the Master was right in holding that the conduct of respondents did not come within the condemnation of the Anti-Trust Acts, nevertheless a substantial Federal question having been presented, at least as of the date of the filing of the bill, which is the date to be considered (*Michigan C. R. Co.* vs. *Vreeland*, 227 U. S. 59, 57 L. Ed. 417), the jurisdiction of the Federal Court attached, and it was bound, or at least privileged, to decide all questions involved in the case, even if not raising a Federal question, under the authority of *Siler* v. *Louisville & N. R. Co.*, 213 U. S. 175, 53 L. Ed. 753, approved *Louisville &*

N. R. Co. v. *Garrett,* 231 U. S. 298, 58 L. Ed. 229, at page 239; *Chicago Great Western R. R. Co.* v. *Kendall,* 266 U. S. 94, 69 L. Ed. 183, at page 188; *Pacific Electric R. Co.* v. *Los Angeles,* 194 U. S. 112, 48 L. Ed. 896, at page 899; *Binderup* v. *Pathé Exchange,* 263 U. S. 291, 68 L. Ed. 308, at page 314.

The Circuit Court of Appeals recognized the authority of *Siler* v. *Louisville & N. R. Co.,* 213 U. S. 175, at page 191, 53 L. Ed. 753, to the effect that, if there was a claim as to the invalidity of a State statute because in violation of the Federal constitution, notwithstanding the fact that the Court held ultimately adversely to plaintiff upon the Federal question, nevertheless, it had jurisdiction and might decide the merits of the case upon other grounds, but it said that the principle was not of universal application referring to the line of cases represented by *Elgin Watch Co.* v. *Illinois Watch Co.,* 179 U. S. 665, 677, 45 L. Ed. 365, and then, after adverting to the fact that there was no decision of this Court to point out the line of differentiation, the Circuit Court of Appeals attempted to harmonize the two lines of cases "as best we may" and reached the conclusion, as I understand it, that it is only when it is necessary to decide the non-Federal question in order to determine the merits of the Federal question that the rule of *Siler* v. *Louisville & N. R. Co.,* 213 U. S. 175, 53 L. Ed., at page 757, applies, which view has never been expressed by this Court as conceded by the Circuit Court of Appeals, that Court stating (p. 106):

> "We think it (the differentiation) is consistent with the actual decisions of the Supreme Court, although no authority has been found which has clearly enunciated it, and it must, indeed, be recognized as scarcely consistent with some of the views

> expressed in Judge Denison's learned opinion in Vogue Co. *v.* Vogue Hat Co., 12 F. (2d) 991 (C. C. A. 6.)"

and which view, even if correct, did not apply in the case at bar because it was necessary for the Court to consider the entire case before deciding the Federal question.

The method in which plaintiffs conduct their business is stated by the Master (p. 58) and the organization of the defendant unions and their purpose (pp. 59, 60), the Master finding that defendant International Union claims for its members jurisdiction over all branches, trades and crafts of the building industry, in shop and outside, throughout the United States and Canada, comprising the fabrication, erection and construction of all iron and steel, ornamental lead, bronze, brass, copper and aluminum, reinforced concrete structures and a large number of other classes of metal work connected with the building industry, including the operation of derricks and cranes on all forms of construction work, the moving, hoisting and lowering of machinery, and practically all other work incidental to the actual construction of buildings and other structures.

The history of the conflict commencing in 1906 between plaintiffs and other contractors engaged in the same line of business is stated by the Master (p. 61, etc.). Briefly, the acts of the Union, its locals and members were as follows: They agreed among themselves that none of their members would work upon steel fabricated by plaintiffs and others engaged in the same line of business operating open shop unless plaintiffs would enter into a contract with them agreeing to employ exclusively union men; they agreed among themselves that no one of their members

would work upon buildings being erected by general contractors who had let contracts to plaintiffs, although on the particular work involved no one of plaintiffs or other contractors operating open shop was concerned and all of the work upon the particular building in all of its branches was being performed closed union shop; they agreed among themselves that no one of their members would work upon a building being erected by an owner, which owner had, upon other work, employed a contractor who had let a contract to plaintiffs or other concerns engaged in the same business operating open shop; they agreed among themselves that they would call to their assistance members of other building trades unions (the building trades in the Metropolitan District of New York being in effect one hundred per cent. unionized, so that no building can be erected without the aid of union labor), to the end that the members of such other building trade unions would decline to work upon any building upon which plaintiffs or others engaged in the same business operating open shop should have sub-contracts for the fabrication and erection of structural iron and steel or for contractors or owners who let contracts to plaintiffs or others engaged in the same business operating open shop.

The evidence showed, and the Master found, that respondents carried out their agreement and to effectuate their purpose indulged in threats and other methods of intimidation directed against owners, contractors and architects, and that their acts were inspired with legal malice within the meaning of the decision of this Court in *Hitchman Coal and Coke Co.* v. *Mitchell*, 245 U. S. 229, 62 L. Ed. 260, and *Eagle Glass Manufacturing Co.* v. *Rowe*, 245 U. S. 275, 62 L. Ed. 286, and that they were guilty of an

illegal boycott within the meaning of *Duplex Printing Press Co.* v. *Deering,* 254 U. S. 443, 65 L. Ed. 349, and the Master summarizes the grounds upon which he based his conclusion that plaintiff's legal rights were being interfered with (p. 91) as follows:

> "To summarize the grounds upon which I base this conclusion: the means employed by defendants to effectuate their purposes were without legal excuse or justification and therefore unlawful (1) because said 'means' have caused intentional damage to plaintiffs' business through threatened injury to the business of innocent third persons (2) because they amounted to intentional coercion of neutrals for the purpose of injuring plaintiffs, (3) because they constituted an injury to the general public, and (4) because, after the strike of 1924 was actually over, and plaintiffs were carrying on with a full complement of workmen, defendants had no authority or standing to interfere between plaintiffs and their employes, or to create or attempt to remedy any grievance in their behalf."

At pages 67, 68 the Master found that the activities of the defendants were having their intended effect upon owners, architects and general contractors.

Had the illegal activities of the unions been continued the result would have been that plaintiffs would not only have been excluded from the Metropolitan District as fabricators and erectors of steel and their fabricated steel would have been excluded but that they and their fabricated steel would have been so excluded over the country for general building work of the nature for which plaintiffs fabricated and erected steel is to a large extent over the country performed as a result of subcontracts from con-

tractors who operate in the Metropolitan District and if one of those contractors gave a contract to plaintiffs, or others engaged in the same business operating open shop anywhere in the United States, the defendants would not perform work upon any buildings under construction in the Metropolitan District by that general contractor. The scope of defendants' activities, therefore, as indicated by the article in the New York Times of February 9, 1925, Plaintiffs' Exhibit P-21, summarizes in the Master's report, page 69, contemplated "a nation-wide movement that might mean the tie-up of millions of dollars worth of building operations all over the country." The conclusion to which the Master came is expressed by him in his report, page 90, as follows:

> "Therefore, I find the fact to be that the defendants, in carrying out their plan to cause the plaintiffs and the other members of the iron league, against their will, to abandon their open shop policy, intentionally entered into a conspiracy to effectuate said plan, and that the acts and conduct of defendants in that behalf were done and committed with the object and purpose intentionally to injure or destroy plaintiffs' business unless they would agree to operate on a union closed shop basis, and intentionally to injure the business and property rights of owners, architects and general contractors, unless they would refuse to award sub-contracts to plaintiffs and other members of the league. I further find that the said acts and conduct of defendants were done maliciously, that is, intentionally and without legal excuse or justification."

Upon the matter of interference with interstate commerce the Master found that, because there was no proof

of an actual intent or purpose to interfere with interstate commerce and because the steel was not condemned as unfair, and interference with its movement was not defendants' primary aim, the work of erecting steel must be regarded as merely local, and, notwithstanding the fact that plaintiffs took single contracts including both the fabrication of the steel in other states and the erection of the steel in New York, there was no actionable interference with interstate commerce, citing *Bedford Cut Stone Co.* v. *Journeymen S. C. Asso.*, 274 U. S. 37, 71 L. Ed. 916; *Industrial Assn. of San Francisco* v. *United States*, 268 U. S. 64, 69 L. Ed. 849.

V.

Specification of Error.

The Circuit Court of Appeals erred in holding that, although the jurisdiction of the District Court was invoked upon the ground that the case was one arising under the laws of the United States, the District Court had no jurisdiction to proceed and determine the case upon the merits under general local or state laws once having determined the Federal question against plaintiffs, that question being, however, substantial.

ARGUMENT.

The Circuit Court of Appeals erred in holding that although the jurisdiction of the District Court was invoked upon the ground that the case was one arising under the laws of the United States, the District Court had no jurisdiction to proceed and determine the case upon the merits under general local or State laws once having determined the Federal question against plaintiffs, that question being, however, substantial.

(A)

The claim of plaintiffs based upon alleged interference with interstate commerce was not unsubstantial.

It can hardly be urged that the claim of illegal interference with interstate commerce was unsubstantial in the light of the fact that no motion was made to strike the allegations with respect to it from the bill and that it was argued upon its merits before the Master, many pages of the briefs of counsel for each side being devoted to its consideration on the merits and that it was argued by both sides upon its merits in the Circuit Court of Appeals.

It is, however, suggested by the Circuit Court of Appeals, that at the time this bill was filed, March, 1925, which is the important date (see *Michigan C. R. Co.* v. *Vreeland,* 227 U. S. 59, 57 L. Ed. 417 (1913); *Boston Store* v. *American Graphophone Co.,* 246 U. S. 8, 62 L. Ed. 551 (1918), the Federal question was not doubtful. But it expressly declined to decide the point or to rest its decision upon it. The Circuit Court of Appeals mentioned *United Mine Workers* v. *Coronado Coal Co.,* 259 U. S. 344, 66 L.

Ed. 975; *United Leather Workers Int. Union* v. *Herkert & Meisel Trunk Co.*, 265 U. S. 457, 68 L. Ed. 1104, as having been decided at that time. But likewise, this Court had decided *Binderup* v. *Pathe Exchange*, 263 U. S. 291, 68 L. Ed. 308; *Ramsey* v. *Associated Bill Posters*, 260 U. S. 501, 67 L. Ed. 368; *Duplex Printing Press Co.* v. *Deering*, 254 U. S. 443, 65 L. Ed. 349.

Pending the hearing of the case and before the argument before the Master, this Court had decided *Bedford Cut Stone Co.* v. *Journeymen S. C. Asso.*, 274 U. S. 37, 71 L. Ed. 916.

The Circuit Court of Appeals referred to its decision in *Aeolian Co.* v. *Fisher*, 29 Fed. (2d) 679 (1928), in which case, by a divided court, it affirmed the District Court in denying a motion for a temporary injunction, but when the case came to the Circuit Court of Appeals again on the refusal of the District Court to grant a permanent injunction, 35 Fed. (2d) 34, it reversed the District Court, 40 Fed. (2d) 190. The decisions of the Circuit Court of Appeals in the Aeolian case illustrate better than anything else could, perhaps, that the claim of plaintiffs under the Anti-trust Acts, considered as of 1925 (or as of this date) was at least substantial. It is only when the claim is so unsubstantial as that it would be forthwith stricken that it can be deemed so unsubstantial as to be frivolous or, in other words, so plainly without color of merit (see *Binderup* v. *Pathe Exchange*, 263 U. S. 291, 68 L. Ed. 308, at p. 314), as that Federal jurisdiction cannot be maintained upon the allegations contained in the bill.

The Circuit Court of Appeals refers to the fact that there was no motive on respondents' part to interfere with interstate commerce. As to this suggestion *International*

Organization v. *Red Jacket C. C. Co.,* 18 Fed. (2d) 839; *United States* v. *Reading Co.,* 226 U. S. 324, 57 L. Ed. 243, holding that, where the necessary results of the acts performed pursuant to or contemplated by the conspiracy is to restrain trade between the States, the intent is presumed, supply the answer.

In *Bedford Cut Stone Co.* v. *Journeymen S. C. Asso.,* 274 U. S. 37, 71 L. Ed. 916, the petitioners were twenty-three companies, engaged in the business of quarrying or fabricating, or both quarrying and fabricating, Indiana limestome in Indiana. The unions were composed of stone cutters, carvers, curb cutters, curb setters, bridge cutters, planermen, lathemen and carborundum moulding machine operators, engaged in the cutting, patching and fabrication of all natural and artificial stones. The defendants were found to have agreed to prevent the erection of that stone in buildings. This Court held that the enforcement of the order to strike against the petitioners' product could have no purpose other than coercing or inducing the local employers to refrain from purchasing such product and the fact that the means adopted to bring about the contemplated restraint of commerce operated after physical transportation had ended is immaterial and that the restraint of such commerce was the necessary consequence of the acts and conduct and immediate end in view, and that since the strikes were directed against the use of the product in other States, with the immediate purposes and necessary effect of restraining future sales and shipments in interstate commerce, the determinative decisions to be applied were those pointed out in the *United Leather Workers International Union* case, 265 U. S. 457, 68 L. Ed. 1104, at page 469, and this Court said:

> "Whatever may be said as to the motives of the respondents or their general right to combine for the purpose of redressing alleged grievances of their fellow craftsmen or of protecting themselves or their organization, the present combination deliberately adopted a course of conduct which directly and substantially curtailed, or threatened thus to curtail, the natural flow in interstate commerce of a very large proportion of the building limestone production of the entire country, to the gravely probable disadvantage of producers, purchasers and the public; and it must be held to be a combination in undue and unreasonable restraint of such commerce within the meaning of the Anti-trust Act as interpreted by this court. An act which lawfully might be done by one, may when done by many acting in concert take on the form of a conspiracy and become a public wrong, and may be prohibited if the result be hurtful to the public or to individuals against whom such concerted action is directed."

As stated above plaintiffs fabricated this steel in states other than New York for erection by themselves in New York under contracts providing both for fabrication and erection and they also fabricated steel for sale to others F.O.B. New York for erection by those others and the steel in every case was specially fabricated in the plants of plaintiffs for specific buildings and the raw materials going into the steel came from still other states. The effect on interstate commerce was just as direct as was the effect of the conduct of the defendants in *Bedford Cut Stone Co.* v. *Journeymen S. C. Asso.*, 274 U. S. 37, 71 L. Ed. 916.

(B)

Notwithstanding the fact that the Master found that there was not actionable interference with interstate commerce the District Court was justified in making the decree which it did upon the authority of *Siler* v. *Louisville & N. R. Co.*, 213 U. S. 175, 53 L. Ed. 753 and cases following.

In setting out the opinion of the Circuit Court of Appeals in the statement of facts, I have indicated the scope of that opinion and the view which that Court took of this Court's opinion in *Siler* v. *Louisville & N. R. Co.*, 213 U. S. 175, 53 L. Ed. 753.

The conflicting opinions of the Circuit Court of Appeals for the Sixth and Second Circuits: *Vogue Co.* v. *Vogue Hat Co.*, 12 Fed. (2d) 991 (6th); *General Investment Co.* v. *Lake Shore and M. S. R. R. Co.*, 269 Fed. 235 (6th), and the case at bar, indicate beyond question that one or the other Circuit Courts of Appeal has misapprehended the scope of this Court's decision in the Siler case reaffirmed by this Court as lately as *Chicago Great Western R. R. Co.* v. *Kendall*, 266 U. S. 94, 69 L. Ed. 183, page 188.

The manner in which the Circuit Court of Appeals for the Second Circuit attempts to harmonize the Siler case and the cases following it with what it conceives to be a limitation upon the rule of that case illustrated by *Elgin Watch Co.* v. *Illinois Watch Co.*, 179 U. S. 665, 677, 45 L. Ed. 365, really results in giving no effect whatever to what this Court said in the Siler case, for, as I understand the opinion of the Circuit Court of Appeals, it is to the effect that, only where it is necessary for the Federal Court to determine the local question first so that it may be able to reach a conclusion as to the ultimate question involving the Fed-

eral constitution or statutes, does the District Court have power to determine the local question, which certainly is not the conception either of the bar or of the Sixth Circuit Court of Appeals of what this Court held in the Siler case.

I do not think that it has ever been questioned but that the Federal District Court had the power to determine the local question if it were necessary so to do to determine the Federal matter. What was questioned was whether, if jurisdiction was based upon the ground that the case arose under the Constitution and the laws of the United States, that Federal question being substantial, the Court having determined that question against the plaintiffs, the Court could then proceed and determine the case upon its merits according to local law, and I submit that that was the question which was answered in the affirmative by this Court in the Siler case.

In the Siler case a bill was filed in the United States Circuit Court to enjoin an order made by a railroad commission in the United States Circuit Court, the jurisdiction of that Court being based upon a claim that the rates were so low as to be confiscatory and that the effect of the statute under which the rates were fixed was an interference with interstate commerce. Included in the same bill was a claim wholly of a non-Federal nature to the effect that the commission had no power to make the order under a correct and proper construction of the State statute. The Circuit Court decided that the statute and the order made under it by the railroad commission were confiscatory. The commission appealed directly to this Court. The jurisdiction of the Circuit Court was attacked. This Court declined to decide the Federal question and in an opinion delivered for a unanimous court Mr. Justice Peckham said (53 L. Ed., at p. 757):

"The Federal questions as to the invalidity of the state statute because, as alleged, it was in violation of the Federal Constitution, gave the circuit court jurisdiction, and, having properly obtained it, that court had the right to decide all the questions in the case, even though it decided the Federal questions adversely to the party raising them, or even if it omitted to decide them at all, but decided the case on local or state questions only.

This court has the same right, and can, if it deem it proper, decide the local questions only, and omit to decide the Federal questions, or decide them adversely to the party claiming their benefit. Horner *v.* United States, 143 U. S. 570, 576, 36 L. ed. 266, 268, 12 Sup. Ct. Rep. 522; Fallbrook Irrig. Dist. *v.* Bradley, 164 U. S. 112, 154, 41 L. ed. 369, 387, 17 Sup. Ct. Rep. 56; Penn. Mut. L. Ins. Co. *v.* Austin, 168 U. S. 685, 694, 42 L. ed. 626, 630, 18 Sup. Ct. Rep. 223; Burton *v.* United States, 196 U. S. 283, 295, 49 L. ed. 482, 485, 25 Sup. Ct. Rep. 243; Williamson *v.* United States, 207 U. S. 425, 52 L. ed. 278, 28 Sup. Ct. Rep. 163; People's Sav. Bank *v.* Layman, 134 Fed. 635; Michigan R. Tax Cases, 138 Fed. 223. Of course the Federal question must not be merely colorable or fraudulently set up for the mere purpose of endeavoring to give the court jurisdiction. Penn. Mut. L. Ins. Co. *v.* Austin, 168 U. S. 695, 42 L. ed. 630, 18 Sup. Ct. Rep. 223; Michigan R. Tax Cases, *supra.*

The character of some of the Federal questions raised is such as to show that they are not merely colorable, and have not been fraudulently raised for the purpose of attempting to give jurisdiction to a Federal court. • • •

Where a case in this court can be decided without reference to questions arising under the Federal Constitution, that course is usually pursued and is

> not departed from without important reasons. In this case we think it much better to decide it with regard to the question of a local nature, involving the construction of the state statute and the authority therein given to the commission to make the order in question, rather than to unnecessarily decide the various constitutional questions appearing in the record."

This Court then expressed itself that, under the statute, the commission had no authority to make a general tariff of rates and affirmed the decree of the Circuit Court for that reason.

In *People's Savings Bank* v. *Layman, County Treasurer (Circuit Court, Southern District of Iowa)*, 134 Fed. 635, cited with approval by this Court in the Siler case, the bill was filed to remove an assessment as a cloud upon title and it was charged that the complainant was entitled to have deducted from the net worth of the bank the amount of United States bonds held by it. It was also charged that if the bonds were not properly deducted still the treasurer had no right to add to the assessment after the bank had been once assessed. The District Court came to the conclusion that the bank had no right to have the value of the bonds deducted. It then proceeded to consider the strictly local question, *i. e.*, could the bank be reassessed after it had been once assessed? Considering the matter from a purely local standpoint and a construction of State statutes, the Court held that there could be no re-assessment and gave a decree for an injunction.

It would appear from the last paragraph of the Court's opinion that it was argued that, having decided the only Federal question in the case adversely to plaintiffs, it lost jurisdiction, in reply to which the Court said, 134 Fed. 641:

"4. The jurisdiction of this court attaches because of the federal question, viz., should the reduction from the value of the shares of stock be made because of the United States bonds? That question, regardless of the citizenship of the parties, gave this court power to take the case and adjudicate the matters in controversy. And the fact that this court has adjudicated the federal question adversely to the bank does not deprive the court of jurisdiction over the other question. The rule is correctly stated in the decision of Judge Brewer in the case of Street Railway Company *v.* Cable Company (C. C.), 32 Fed. 727."

In the *Michigan Railroad Tax Cases,* 138 Fed. 223, cited with approval by this Court in the Siler case, there was a bill in equity to enjoin collection of taxes and the jurisdiction of the Court was invoked upon the ground that the constitution and statute of Michigan under which the tax was levied were repugnant to the Constitution of the United States. The Court said upon the subject we are discussing, and I quote it copiously because the language was before this Court when it decided the Siler case and the language of the Court in the Michigan Railroad Tax Cases may be considered in connection with what this Court said in the Siler case, 138 Fed. 230:

"But it is seriously contended by the defendant that if the federal questions which are raised by the bills, which it is conceded are not fictitious, and which gave the court jurisdiction, are decided against the complainants, although the court had jurisdiction to dispose of these questions, its jurisdiction immediately ceases, and it may not decide the question of the undervaluation of the property of the state which is not taxed under the statute in question,

when compared with the valuation placed upon the property of the complainants which is so taxed. Of course, if the claim that the Constitution and statute of the state violate the Constitution of the United States is fictitious and fraudulent, the Circuit Court of the United States could not acquire jurisdiction; but if that claim is real, and the court acquired jurisdiction, it does not lose it because its decision on that question is against the complainants' contention. If this were not so, all bills for injunction, in which the jurisdiction of the federal court is invoked on account of a statute or Constitution of a state contravening the provisions of the federal Constitution, should be disposed of without putting the parties to the expense of taking testimony, because no testimony could possibly be considered. If it were found that the contention of the complainants was well founded, then an injunction would follow as a matter of course; and if it were found that the Constitution or statute did not violate the provisions of the federal Constitution, the jurisdiction of the court would immediately determine, and the bill be dismissed. If that contention is well founded, then in these cases two years of time, and many thousands of dollars spent in taking testimony, should have been saved. But we cannot assent to this view. If the court actually acquires jurisdiction, that jurisdiction, although acquired because the Constitution or law of a state is claimed to be in contravention to the Constitution of the United States, extends to all questions involved in the controversy, and not merely to the question of the violation of the federal Constitution. Jurisdiction of a federal court having been properly invoked for relief against assessments as discriminating against complainant, and thus depriving it of the equal protection of the laws, under the fourteenth amendment, where the complainant fails to show discrimination the bill may be retained

> to administer relief on other grounds, although the state court could afford adequate remedy. This was held in Louisville Trust Co. *v.* Stone, 107 Fed. 305, 46 C. C. A. 299, where Justice Day, in delivering the opinion of the Circuit Court of Appeals of this circuit cites with approval the case of Nashville, etc., Railway Co. *v.* Taylor (C. C.) 86 Fed. 168, in which the grounds of federal jurisdiction are carefully examined and fully stated in an able opinion by Judge Clark. Where the Supreme Court of the United States acquires jurisdiction on appeal from this court only because a law of a state is claimed to be in contravention of the Constitution of the United States, the appeal is not dismissed because the Supreme Court decides that the claim of the federal question involved is not well founded. If the claim is real and is made in good faith, then the Supreme Court acquires jurisdiction of the entire case, and of all questions involved in it."

This Court, in *Louisville & Nashville Railroad Co.* v. *Garrett*, 231 U. S. 298, 58 L. Ed. 229, in a case to enjoin the enforcement of orders of a railroad commission upon the ground that the orders violated the statutes of the United States and the statutes of the state, speaking by the present Chief Justice, said, 231 U. S. 298, at page 303, 58 L. Ed. 239:

> "Because of the Federal questions raised by the bill the circuit court had jurisdiction and was authorized to determine all the questions in the case, local as well as Federal. Siler *v.* Louisville & N. R. Co., 213 U. S. 175, 191, 53 L. ed. 753, 757, 29 Sup. Ct. Rep. 451."

To the same effect is *Greene* v. *Louisville & Interurban Railroad Co.*, 244 U. S. 499, 61 L. Ed. 1280, and *Davis* v.

Wallace, 257 U. S. 478, 66 L. Ed. 325, and *Lincoln Gas & Electric Light Co.* v. *Lincoln,* 250 U. S. 256, 63 L. Ed. 968, and *Southern Railroad Co.* v. *Watts,* 260 U. S. 519, 67 L. Ed. 375, and *Atlantic Coast Line R. Co.* v. *Daughton,* 262 U. S. 413, 67 L. Ed. 1051.

In *Chicago Great Western Railway Co.* v. *Kendall,* 266 U. S. 94, 69 L. Ed. 183, this Court, speaking by the late Chief Justice Taft, said, 266 U. S. 97, 69 L. Ed. 188:

> "Jurisdiction of the bill in the Rock Island Case depends on the averment that the attempted assessment of complainant's railroad property in Iowa, complained of, was at a rate and upon a basis greater than the assessment of other property of the same class subjected to taxation in Iowa, and that the suit arises under the 14th Amendment to the Federal Constitution forbidding any state to deprive any person of his property without due process of law, or to deny him the equal protection of the law. We think this averment, in view of the allegations of the bill, invoked a substantial controversy under the Federal Constitution, and gave the district court jurisdiction. Its jurisdiction thus established gave the district court the authority to determine all questions involved, including questions of state law, irrespective of the disposition of the Federal question; and as the relief to which the complainant might be entitled would be the same as that which should be allowed him by the Federal court upon a construction of the state Constitution and laws such as he contends for, the question whether the acts complained of violated the Federal Constitution need not be decided. * * * It follows, therefore, that in both the cases under consideration, the district court has jurisdiction to consider and decide whether the complainants in these cases are so injured by a violation of the state Constitution and laws in the taxation of their prop-

> erty as to entitle them to the equitable remedy of injunction against the taxing officials made defendants."

The Circuit Court of Appeals below, however, considered that there was a limitation placed upon the rule announced by these cases by the decision of this Court in *Elgin Watch Co.* v. *Illinois Co.*, 179 U. S. 665, 45 L. Ed. 365, and the cases following it, *A. Leschen & Sons Rope Co.* v. *Broderick & Bascom Rope Co.*, 201 U. S. 166, 50 L. Ed. 710; *Stark Brothers* v. *Stark*, 255 U. S. 52, 65 L. Ed. 496, and reference was also made to *Standard Paint Co.* v. *Trinidad Asphalt Co.*, 220 U. S. 446, 456, 55 L. Ed. 536; *Geneva Furniture Co.* v. *Karpen*, 238 U. S. 254, 59 L. Ed. 1295. This line of cases has been so well distinguished by Judge Denison, delivering the opinion for the 6th Circuit Court of Appeals in *Vogue Co.* v. *Vogue Hat Co.*, 12 Fed. (2d) 991, as that I can do no better than to repeat his language, 12 Fed. (2d) 993:

> "However, there is another familiar line of cases, growing out of the power of the Supreme Court of the United States to review the decisions of state courts. Upon principles of public policy, it may be important that this power should be confined to the federal question, and the language of the various statutes indicates this restriction. Accordingly, we find the Supreme Court repeatedly refusing to consider any other question after it has decided this first one adversely to the appellant.
>
> It is this latter restrictive principle, which to some extent the Supreme Court has applied to the patent-plus-unfair competition cases. In the earliest one which has come to our attention the Circuit Court of Appeals had said (Illinois Co. *v.* Elgin Co.,

94 F. 667, at page 669, 35 C. C. A. 237, 239) that 'It is of course, clear that the bill could not be sustained unless the federal right was sustained.' The registered trade-mark, by virtue of which alone federal jurisdiction was invoked, was held to be invalid. The Supreme Court rather summarily (179 U. S. 677, 21 S. Ct. 275, 45 L. Ed. 365) affirmed, saying that, 'if the trade-mark were not lawfully registered, then jurisdiction could not be maintained.' In neither court was the suggestion advanced or considered that the good faith claim of federal right gave jurisdiction to decide all grounds of the controversy. In Lescher *v.* Broderick, the Circuit Court of Appeals held (134 F. 571, 67 C. C. A. 418), on authority of the Elgin Case, that, if the registered trade-mark was invalid, there was no jurisdiction to hear the remainder of the quarrel between the parties who were citizens of the same state. The Supreme Court, in 201 U. S. 172, 26 S. Ct. 427, 50 L. Ed. 710, said: 'Our jurisdiction depends solely upon the question whether plaintiff has a registered trade-mark valid under the act of Congress.' Again the general principle that a jurisdiction, once acquired, extends to the whole controversy, was not considered. The only other touching of the question by the Supreme Court which we find is in Stark *v.* Stark, 255 U. S. 50, 52, 41 S. Ct. 221, 65 L. Ed. 496, where the Leschen Case is somewhat casually cited as indicating this limitation on the federal trial courts.

Geneva Co. *v.* Karpen, 238 U. S. 254, 255, 259, 35 S. Ct. 788, 59 L. Ed. 1295, is also now cited to the same effect; but that case seems to have presented in the end a question of venue rather than of subject-matter. It was in effect held that the restriction of personal jurisdiction over a defendant to the district of his residence (or plaintiff's) was a funda-

mental protection to him, and hence that the exception permitting him to be sued elsewhere for patent infringement would not be enlarged to permit him to be sued away from home also for something else, even though the two grounds of suit might otherwise be united. The decision cannot well be carried further. If the comment (page 259 (35 S. Ct. 790)), 'The rule otherwise prevailing respecting joinder of actions in equity cases must, of course, yield to the jurisdictional statute,' were to be taken at its fullest extent, it would be inconsistent with the rule of the Siler and Davis Cases, *supra*, and that cannot have been the intent.

So, also, we are now cited to Standard Co. *v.* Trinidad Co., 220 U. S. 446, 31 S. Ct. 456, 55 L. Ed. 536; but that case is not helpful here. The point decided was that, where there was diverse citizenship in a case based upon a registered trade-mark and unfair competition, the jurisdiction of the District Court was not so entirely dependent on the diverse citizenship, even after a decision that the registry was invalid, so as to make the decision of the Circuit Court of Appeals final under sections 128 and 241 of the Code, being Comp. St. secs. 1120, 1218 (in their then current form). The implications as to what would have been the result, if there had been no diverse citizenship, are too indefinite for positive application here."

In *General Inv. Co.* v. *Lake Shore & M. S. Ry Co.*, Circuit Court of Appeals for the Sixth Circuit, 269 Fed. 235 there was a bill to enjoin violations of the anti-trust act and also to enjoin the contemplated consolidation of two railroad companies there involved upon the ground that there would be a violation of the constitutions, statutes, and public policies of the states concerned. The case was

originally instituted in the State Court and was removed to the Federal Court upon the ground—(1) the matter arose under the laws of the United States; (2) diversity of citizenship. The Circuit Court of Appeals held that there was no cause of action stated under the Federal laws. The court also held that the bill alleged no substantial damages. It was insisted that the case should, therefore, be remanded to the State Court rather than that a decree be entered dismissing the bill. To this suggestion the Circuit Court of Appeals answered (269 Fed. p. 241), as follows:

> "The suggestion presents itself whether there may be a duty to remand to the state court rather than dismiss the bill. Since we hold that plaintiff does not state a good case for relief arising under the laws of the United States, it might be said that jurisdiction to dispose of the merits then rests only on diverse citizenship, and that this was an insufficient basis, in the face of our holding that the bill alleges no substantial damages. In a controversy like this, the damage to plaintiff is not necessarily the only amount involved; but, if it were, this result does not follow. If the case had been originally commenced in the federal court, and the jurisdiction of that court had been invoked only on the ground that the case arose under the laws of the United States, it is settled that the court would proceed to dispose of all the questions in the case, even after it had reached the conclusion that plaintiff had failed to make out a good case on the federal question. Siler *v.* Louisville Co., 213 U. S. 175, 191, 29 Sup. Ct. 451, 53 L. Ed. 753. We do not see how the question is different when the case is begun in the state court and is removed. See Missouri *v.* Missouri Com'rs., 183 U. S. 53, 59, 22 Sup. Ct. 18, 46 L. Ed. 78. If we thought no federal question was then in-

> volved, so that the case had not been removable on that ground, we would have a different situation; but we have not reached any such conclusion as that. The case, as formulated in the bill, plainly was one arising under the laws of the United States. The removal, whether on that ground or not, brought into the federal court a case which then came to be rightly here, and jurisdiction of the case so obtained (and to the extent possessed by the state court) continues for all purposes."

This Court modified the decree by making the dismissal without prejudice to all parts of the bill but not upon the ground of lack of jurisdiction of the District Court to grant relief because of the claimed infractions of the State constitutions and laws but upon the ground that the pleadings did not show a right to equitable relief. 260 U. S. 261, 67 L. Ed. 244.

There was no criticism of the position taken by the Circuit Court of Appeals that, although that Court had determined the Federal question adversely to the plaintiffs, the Court retained jurisdiction to determine the local question. The Circuit Court of Appeals for the 2nd Circuit in the case at bar states that in the General Investment Co. case "there was Federal jurisdiction over the second (the local question) because of diverse citizenship." But the Circuit Court of Appeals in the General Investment case had held that the bill alleged no substantial damages which it was claimed indicated that the Federal Court had no jurisdiction upon the ground of diversity of citizenship because the jurisdictional amount was not involved. While the Circuit Court of Appeals did say that the damage to the plaintiff is not necessarily the only amount involved, it placed its ruling that the Federal Court had jurisdiction over the local ques-

tion upon the ground that jurisdiction was invoked upon the ground that the case was one arising under the statutes of the United States.

The Circuit Court of Appeals in the case at bar attempted to reconcile the line of cases illustrated by *Siler* v. *Louisville & N. S. R. Co.*, 213 U. S. 175, 53 L. Ed. 753, and that illustrated by *Elgin Watch Co.* v. *Illinois Watch Co.*, 179 U. S. 665, 677, 45 L. Ed. 365, by holding, in effect, that it is only where the United States District Court must necessarily decide the local question before deciding the Federal question that the local question can be decided if the Federal question be decided adversely to the plaintiff. But there is no suggestion in any decisions of this Court of any such limitation upon the principle of the Siler case and any such circumscription of the principle is, I submit, contrary to the express language of this Court.

If the rule be as stated by the Circuit Court of Appeals for the 2nd Circuit in the case at bar, then nothing is left of the principle of the Siler case because, as I have heretofore stated, it never was doubted but that, if there was a local question which had to be decided before the Court could approach the Federal question, the Court would have the right to decide the local question. Moreover, it was not necessary in the Siler case or in the cases following it, to decide the local question in order to decide the Federal question as is very clearly pointed out by Judge Wanty in the *Michigan Tax* cases, 138 Fed. 223, at page 230, which case was cited by this Court in the Siler case.

The jurisdiction of the Federal Court was invoked in the *Siler* case upon the ground that the rate orders of the Commission under review were violative of the Fourteenth Amendment in that they were confiscatory. Having thus

invoked the jurisdiction of the Court solely by reason of the existence of a Federal question, the bill also charged that in making such orders the Commission exceeded its statutory authority. The determination of the Federal question presented depended in no wise upon the determination of the question of State law raised. Nor was the decision of the latter question a decision necessary to be determined in passing upon the Federal question. On the contrary, the Federal question presented depended in the first instance upon the determination of issues of fact relating to the valuation of the plaintiff's property and its income and expenses under the rates prescribed, while the question of State law related solely to the interpretation of the act under which the Commission had proceeded. It was upon this state of facts and the issues raised thereby that the broad language hereinbefore quoted from the decision in the *Siler* case (p. 22) was used, wherein it was stated that the Court having obtained jurisdiction by reason of the raising of a Federal question,

> "had the right to decide all the questions in the case even though it decided the Federal questions adversely to the party raising them, or even if it omitted to decide them at all, but decided the case on local or state questions only."

Under these circumstances, the Circuit Court of Appeals clearly erred in holding the doctrine of the *Siler* case to be limited to cases in which it is necessary for the Court to determine questions of State or general law before it may determine the Federal questions raised. Whatever the distinction between the *Siler* case and the *Elgin Watch* and other cases relied on by the Circuit Court of Appeals, it is not the distinction sought to be drawn by that Court.

Nor would the jurisdiction of the Court in the *Siler* case have been any less complete if the Federal question on which its jurisdiction was solely invoked had arisen, as in the present case, under a Federal statute instead of under the Constitution itself. Clearly, if the rate orders of the State Commission in that case had been assailed upon the ground that they were void, because constituting an interference with interstate commerce under the Interstate Commerce Act, instead of because violative of the Fourteenth Amendment, the jurisdiction of the Court would have been equally complete, and it would have obtained jurisdiction to determine the question of State law presented if its decision upon the Federal question raised was adverse to the plaintiff, or if it had omitted to decide such question at all. It is idle to suggest that in such a situation a railroad company affected by such an order would be required to split its cause of action—assuming that it could properly and lawfully do so—and bring suit in the Federal Court to enjoin the order as violative of a Federal statute, and at the same time proceed in the State Court to set it aside by reason of violation of the State law, or, in the alternative, proceed in the State Court alone if it desired to make certain the retention of both grounds of attack. Yet such would be the practical effect of the interpretation placed upon the *Siler* case by the Circuit Court of Appeals in any case where the determination of the issues raised by the Federal question, whether of law or of fact, may be doubtful. The only distinction between the case assumed and the present case is that in the present case the Federal question presented arose under the Sherman Act instead of under the Interstate Commerce Act. Nor is there anything either in the subsequent decisions of this Court following the *Siler* case

or in the facts under which they arose, suggestive of the limitation imposed by the Circuit Court of Appeals upon the doctrine of these cases. On the contrary, in all such cases, as in the *Siler* case itself, the questions of local or general law involved where wholly independent of the Federal question presented and in no way necessary to its determination. (See cases cited, p. 26 *ante.*)

In *Greene* v. *Louisville & Interurban R. R. Co.*, 244 U. S. 499, 61 L. Ed. 1280, this Court stated at page 1285:

> "(3) The contention of plaintiffs, set forth in their respective bills of complaint, that the action of the Board of Valuation and Assessment in making the assessments under consideration and the threatened action of defendants in respect of carrying those assessments into effect constituted action by the State, and if carried out would violate the equal protection provision of the Fourteenth Amendment, presents, without question, a real and substantial controversy under the Constitution of the United States, which (there being involved a sum and value in excess of the jurisdictional amount) conferred jurisdiction upon the federal court, irrespective of the citizenship of the parties. This being so, the jurisdiction of that court extended, and ours on appeal extends, to the determination of all questions involved in the case, including questions of state law, irrespective of the disposition that may be made of the federal question, or whether it be found necessary to decide it at all. *Siler* v. *Louisville & Nashville R. R. Co.*, 213 U. S. 175, 191, 53 L. Ed. 753, 757, 29 Sup. Ct. Rep. 451; *Ohio Tax Cases*, 232 U. S. 576, 586, 58 L. Ed. 738, 743, 34 Sup. Ct. Rep. 372."

That the Court never intended any such limitation is also demonstrated by its decision in *Lincoln Gas Company* v. *Lincoln*, 250 U. S. 256, 63 L. Ed. 968, wherein the Court

pointed out (at p. 975) the error of counsel for plaintiffs below in assuming that the tax ordinance therein involved could be assailed in a court of the United States only upon the ground that it was violative of the Constitution of the United States, apparently, as said by the Court:

> "overlooking that, even without diversity of citizenship (and there was none), if the bill presented a substantial controversy under the Constitution of the United States and the requisite amount was involved, the jurisdiction extended to the determination of all questions, including questions of state law, and irrespective of the disposition made of the Federal questions. *Greene* v. *Louisville & Interurban R. R. Co.*, 244 U. S. 499, 508, 61 L. Ed. 1280, 1285."

Section 2 of Article III of the Constitution provides that

> "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, * * *."

The Judicial Code (Section 24) as amended by Act of March 3, 1911, c. 231, section 24, 36 Stat. 1091, 28 U. S. C. A., sec. 41, page 32, confers upon District Courts jurisdiction over suits

> "where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000, and (a) arises under the Constitution or laws of the United States, * * *."

The effect of the decision of the Circuit Court of Appeals, if affirmed, would be to destroy the jurisdiction thus conferred and to prevent resort to the Federal Courts in any case where a question of general or state law, as well as a Federal question, is present, and require all such litigants to proceed in the State Courts if in any doubt as to

the way in which the issues of fact or law involved in the Federal question may be decided. This is in effect saying that, despite the broad powers conferred both by the Constitution and the Judicial Code, and the interpretation heretofore given by this Court in the *Siler* and other cases, the Federal Courts are without jurisdiction to determine any questions other than those of Federal law, where jurisdiction is invoked solely on the ground of the existence of a Federal question. This necessarily follows, for, if the Federal question is determined in favor of the plaintiff, determination of the other questions becomes unnecessary except in that limited class of cases where their determination may be incidental to the relief afforded under the Federal question.

The class of cases affected by the limitation thus imposed by the Circuit Court of Appeals upon the jurisdiction of the Federal Courts is almost without number. A single illustration will suffice. For instance, in a case where the complainant brought suit to enjoin a sale of assets by one corporation to another on the ground that the State statute authorizing such sale or merger was unconstitutional under the Federal Constitution (diversity of citizenship being absent), and also upon the ground of fraud, if the Federal Court decided the constitutional question adversely to the complainant, it would be without power to determine the issues of law and fact raised by the allegations of fraud. Clearly, the determination of the latter would not be necessary to the determination of the former. As, clearly, if the Federal question were determined in favor of the plaintiffs, it would be unnecessary for the Court to determine the questions of general law involved in the other issues raised. Yet the relief to which the plaintiff would be entitled in

either case would be the same. Under the settled law, as declared by this Court, the Federal Court in such a case having obtained jurisdiction by reason of the existence of the Federal question presented, acquires jurisdiction to pass upon the questions of general law raised and may grant appropriate relief thereunder, even though the Federal question should be determined adversely to the plaintiff.

So in this case. Indeed, in a case of this character there is an added reason why the doctrine of the *Siler* case should be applied. The acts sought to be enjoined were the same acts, whether violative of the Federal Anti-Trust Laws or only of the common law. In either case the injury sustained was the same. But a suit by an individual to enjoin a violation under the Anti-Trust Laws may be brought only in the Federal Courts. §15 *Clayton Act,* 38 Stat. 731, Title 15, U. S. C. A., Sec. 15, page 167. *General Investment Co.* v. *Lake Shore & M. S. Ry. Co.,* 269 Fed. 235 (C. C. A., 6th). The plaintiffs could not, therefore, if they had resorted to the State Courts, have invoked the Federal Anti-Trust Laws as a basis of relief. Only in the Federal Court could both grounds of relief against the commission of the same acts be invoked. The effect of the decision of the Circuit Court of Appeals, therefore, is to say that the plaintiffs would be compelled to abandon one or the other of the grounds of relief relied on by suing in the Federal Court for relief under the Sherman Act only or in the State Court for relief from a common law conspiracy only, or, in the alternative, that the plaintiffs should have proceeded simultaneously to obtain relief from the same acts in both courts. Neither the Constitution, the Judicial Code, nor the decisions of this Court so limit the jurisdiction of the Federal Courts, where a Federal question—not frivo-

lous—is raised, so as to produce any such incongruous result. The Master in the District Court held that, although the acts complained of did not violate the Anti-Trust Laws, because they did not directly interfere with interstate commerce (a decision which, it is respectfully submitted, is erroneous), the same acts were unlawful because committed in furtherance of a common law conspiracy, and on that account should be enjoined. The Court had jurisdiction to determine this question, and upon the basis of the determination made, to make the decree entered.

Elgin Watch Co. v. *Illinois Watch Co.*, 179 U. S. 665, 45 L. Ed. 365, and the cases following it, upon which the Circuit Court of Appeals relied, are all cases involving trademark infringement, a field of the law in which many doctrines peculiar to that field alone have been laid down. Whatever the precise basis of the decision in that and kindred cases may be, they clearly do not limit and were not intended to limit the doctrine of the *Siler* case, decided eight years later, or to oust the jurisdiction of the Federal Court once obtained to determine all questions of fact and law, however the Federal question upon which such jurisdiction was invoked may be determined.

Upon principle I submit there can be no distinction between a case where the same act is alleged to be in violation of the Federal constitution and statute and also in violation of the statute, constitution or public policy of a state (the *Siler* and other cases), and the case at bar where the same set of acts is claimed to be in violation of a Federal statute and also of the State law and the general law.

If, in the first case, the Federal question being decided adversely to the plaintiff, still the Court retains jurisdiction to decide the merits of the local question, I submit that the same result must follow in the second and that cases

similar to that at bar as *People's Savings Bank* v. *Layman*, 134 Fed. 635, were properly decided.

The two lines of cases in this court illustrated by the *Siler* case and the *Elgin Watch Co.* case may be reconciled in the manner indicated by Judge Denison in *Vogue* v. *Vogue Hat Co.*, Circuit Court of Appeals, 6th Circuit, 12 Fed. (2d) 991, at page 994, without destroying the principle of the *Siler* case. He states three considerations and comes to the conclusion that the most tenable ground of distinction is that in a patent unfair competition case the plaintiff must show the existence of a valid patent. In other words, he must show his title. If he does not show his title, then he is out. The Court has no jurisdiction to proceed with the case until the title of the plaintiff is made out, to wit, by showing a valid patent. If he fails to show a valid patent, then the Court need not and perhaps cannot go further.

It might be argued that this principle would apply here if plaintiffs had not shown that they were in fact engaged in interstate commerce. It might be said that such a showing was as necessary to establish their "title" to seek relief under the Federal statute as the showing of a valid patent is necessary in a patent case. But it is not necessary to consider that question for it is conceded that plaintiffs were engaged in interstate commerce. Having shown that fact, plaintiffs then are in the same position as were the plaintiffs in the *Siler* and other cases in which it was alleged that the same set of acts was a violation of plaintiffs' rights under both Federal and local law.

Judge Denison applied this distinction in the Vogue case and held in that inasmuch as a valid trade mark had been shown, the Court had jurisdiction under the Elgin

case and, although it then determined that there was no infringement of that valid trade mark it might grant relief upon the ground that the same acts claimed to have constituted the infringement of the trade mark constituted unfair competition.

In the case at bar the same acts claimed to give plaintiffs the right to relief under the Federal statute were also claimed to give the right to the plaintiffs to relief under the state law and public policy and general law.

The Siler case, as interpreted by Judge Denison, is in accord with the general rule with respect to jurisdiction stated by this Court in *Pacific Electric R. Co.* v. *Los Angeles*, 194 U. S. 112, 48 L. Ed. 896, at page 899, as follows:

> "In those cases the question of jurisdiction was presented on motion to dismiss. In the case at bar it is presented by demurrer; but, however presented, jurisdiction depends primarily upon the allegations of the bill, not upon the facts as they may subsequently turn out. City Railway Co. *v.* Citizens' Street R. Co., 166 U. S. 557, 41 L. Ed. 1114, 17 Sup. Ct. Rep. 653. Nor upon the actual sufficiency, in the opinion of the court, of the facts alleged to justify the relief prayed for. We do not mean, however, that a mere claim in words is sufficient; a substantial controversy must be presented. This requirement is satisfied in the case at bar. The circuit court, therefore, had jurisdiction, and the case was properly brought here from that court, since it involves the construction and application of the Constitution of the United States."

And in *Binderup* v. *Pathe Exchange*, 263 U. S. 291, 68 L. Ed. 308, at page 314, in speaking of the matter of Federal jurisdiction, upon a claim under the Constitution and Laws

of the United States, which would permit a direct appeal to the Supreme Court, this Court in an opinion by Mr. Justice Sutherland, said:

> "Jurisdiction is the power to decide a justiciable controversy, and includes questions of law as well as of fact. A complaint setting forth a substantial claim under a Federal statute presents a case within the jurisdiction of the court as a Federal court; and *this jurisdiction cannot be made to stand or fall upon the way the court may chance to decide an issue as to the legal sufficiency of the facts alleged any more than upon the way it may decide as to the legal sufficiency of the facts proven.* Its decision either way, upon either question, is predicated upon the existence of jurisdiction, not upon the absence of it. Jurisdiction, as distinguished from merits, is wanting only where the claim set forth in the complaint is so *unsubstantial as to be frivolous; or, in other words, is plainly without color of merit.*"

Even if the rule announced by the Circuit Court of Appeals for the 2nd Circuit in the case at bar, to wit, that it is only where it is necessary for the Federal Court to determine the local question to ascertain whether the plaintiffs should have relief upon the Federal question that the Court has the right to proceed having decided the Federal question adversely to plaintiff, this case is within that rule because it was necessary for the District Court to consider all of the acts of the parties, the testimony with respect to which is contained in a book of upwards of 2000 pages, before it could reach a conclusion as to whether those acts were such as that plaintiffs were entitled to a remedy under the Federal statute and in so determining the Court

was obliged to reach a conclusion as to whether those acts would violate plaintiffs' rights under the general law.

But I submit that that is not a proper ground of distinction and that the only workable ground of distinction which will permit the doctrine of the Siler case to have any play whatever is that indicated by Judge Denison in the Vogue case. The Circuit Court of Appeals for the Sixth Circuit in *Automotive Products Corporation* v. *Wolverine Bumper & Specialty Co.*, 15 Fed. (2d) 745, at page 747, cited its own opinion in the Vogue case.

This Court denied certiorari in the Vogue case, 273 U. S. 706, 71 L. Ed. 850.

The Vogue case was followed in *Hutto Engineering Co. Inc.* v. *Grinder Sales Co.* (District Court, Eastern District of Michigan), 18 Fed. (2nd) 981.

Conclusion.

It is respectfully submitted that the Circuit Court of Appeals for the Second Circuit was in error in holding that the District Court had no jurisdiction to make the decree which it did and that the decree of the United States Circuit Court should be reversed.

Respectfully submitted,

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